DATO' SERI ANWAR IBRAHIM

v.

SUN MEDIA CORPORATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-08-1999]
20 MAY 1999

CIVIL PROCEDURE: *Trial - Preliminary issues - Hearing of preliminary issues before trial proper - Order 33 r. 2 Rules of the High Court 1980 - Whether to be allowed*

The defendant, who was sued for libel, applied for leave to raise three issues before the trial proper pursuant to O. 33 r. 2 of the Rules of the High Court 1980 ('the RHC'). The plaintiff raised a preliminary objection, arguing in essence that the application for leave was flawed as the defendant had not served their supporting affidavit within the time stipulated in O. 32 r. 13(2)(a) of the RHC. The facts showed, however, that, by an affidavit affirmed by one Gobind Singh Deo, the objection taken by the plaintiff relates rather to 'late service of the summons' and not to the issue of late service of the defendant's affidavit. The issue that arose was whether the plaintiff's preliminary objection, in the circumstances, must necessarily fail, and if so, whether the plaintiff ought to be allowed to raise the preliminary issues in question.

Held:

[1] The plaintiff must know that if he had specifically pleaded in the affidavit that the summons was served out of time and made no mention of the fact that the affidavit was served one day later, then that is all that the defendant is expected to reply. The submission that the defendant ought to know that it was the affidavit the plaintiff was objecting to, is an argument that is a *non-sequitur.*

[2] The defendant has submitted fully on the issues of qualified privilege, statutory qualified privilege and qualified privilege as a reply to an attack. Likewise, the plaintiff has raised the issue of malice and also touched on the defendant's allegation of fair comment. That being so, both sides must realise that, once the court decides on their respective submissions they can be precluded from raising the same issues at the hearing of the application proper. In the circumstances, to be fair to both, it is wise that the court defer its decision on the issues raised.

[3] In any case, this is only an application for leave for the court to consider if the defendant can be allowed to raise three issues before trial. The application ought to be allowed, bearing in mind the argument that the preliminary issues, if heard, may put an end to what might be a long and protracted trial.

[Leave granted]

Case(s) referred to:

Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 12

Rules of the High Court 1980, O. 3 r. 2(2), O. 32 rr. 3, 13(2)(a), O. 33 r. 2

For the plaintiff - Karpal Singh (M Manoharan & Gobind Singh Deo with him); M/s Karpal Singh & Co

For the defendant - VK Lingam (V Siva & R Thayalan with him); M/s V Siva & Partners

Reported by WA Sharif

JUDGMENT

RK Nathan J:

The Statement Of Claim

The plaintiff was the Deputy Prime Minister of Malaysia. The plaintiff sued the defendant for RM100,000,000 for libel contained in an article headed:

> Anwar's behaviour despicable: PM

The defendant is the publisher and printer of *"The Sun"* newspaper. The plaintiff contends that the said article was published falsely and maliciously. For the purposes of this application it is unnecessary to go into the details of the publication. The plaintiff thus claimed in addition to the damages, an injunction to restrain the defendant by its directors, servants and/or agents from further publishing the said or any similar libel. The plaintiff also claimed for interests and costs.

The Defence

In its defence *inter alia* the defendant admitted publishing the entire article which the defendant contended was in addition to a longer article published as the front page lead story under the heading *"Anwar's* fear: He faces at

least 12 sex-related charges" which was continued on p. 2 under the sub-heading "Mahathir: Police surprised by how far protesters would go". The defendant contended that it would refer to the whole of both articles to establish the context in which the words complained of were published. The defendant denied the allegation of malicious publication.

The defence was one of qualified privilege and the defendant contended that it was its legal and moral duty to publish the said article as the public had a legitimate interest to receive the said information that was published. To avoid doubt the defendant reproduced the full text of the Prime Minister's press conference out of which arose this suit for defamation.

The defence also raised statutory qualified privilege by pleading that the said words were a fair and accurate report of a press conference held by the Prime Minister of Malaysia by and on behalf of the Government of Malaysia for the benefit and information of the public. In respect of this defence of statutory qualified privilege the defendant specifically relied upon the provision of s. 12 of the Defamation Act 1957 and Part II of the Schedule to the Defamation Act 1957.

Thirdly the defence was, that the words complained of were published upon an occasion of qualified privilege because they were, or formed part of a reply by the Prime Minister, to an attack upon the Prime Minister by the plaintiff who alleged that the Prime Minister was part of a conspiracy to "fabricate and create charges" against him. Accordingly the defendant contended that in publishing the words complained of, the defendant was publishing the reply of the Prime Minister to an attack upon him by the plaintiff for which the plaintiff had sought and obtained wide publicity.

The Reply

In his reply the plaintiff contended that the defence of qualified privilege was not open to the defendant as the defendant was actuated by malice.

This Application

The defendant filed this application for leave to try certain issues pursuant to O. 33 r. 2 of the Rules of the High Court 1980 (the RHC). The said rule reads as follows:

> 2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

The reason for the introduction of this rule is obvious. If a party who invokes this rule is able to show to the court that by trying certain issues of fact or law before the full trial of the suit and by so doing the case can be brought to a conclusion expeditiously then the court will grant the person invoking this particular order and rule leave to pose that particular issue of fact or law or of mixed fact or law to be tried well before the full trial of the suit which might even take years to conclude.

The defendant in this case has applied by this application for leave for the following issues to be decided well before this trial and by so doing the defendant contends that the case can be concluded much earlier.

The defendant wishes the court to decide:

(1) if the said publication complained of was protected by qualified privilege at common law;

(2) whether the said publication was published upon an occasion of statutory qualified privilege by virtue of the provision of s. 12 of the Defamation Act 1957 and para. 5 of Part II of the Schedule to the Defamation Act; and

(3) whether the words complained of were published upon an occasion of qualified privilege because they were or formed part of a reply to an attack.

There were other consequential prayers seeking for directions and for costs.

Preliminary Objection By The Plaintiff

On 6 May 1999 when I heard this application Mr Karpal Singh raised a preliminary objection. He pointed out that this application (encl. 8) was filed on 6 April 1999 and that the affidavit in support of the said application which was also, affirmed on 6 April 1999 was served on his firm on 21 April 1999. He contended that this was in flagrant breach of O. 32 r. 13(2)(a) of the RHC. The said rule reads as follows:

> (2) Save as otherwise provided in these rules -
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

Pointing out that encl. 7 (the affidavit) although filed on 6 April 1999, was only signed by the Senior Assistant Registrar on 19 April 1999 Mr Karpal Singh argued that the date to account for the 14 days, ought to run from 7 April 1999, since the date of filing ought not to be counted. He relied on O. 3 r. 2(2) of the RHC which reads:

(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

In support of his contention that time must run from the date of filing and not when it was sealed, Mr Karpal Singh relied on *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 where the Court of Appeal said at p. 586:

> However, we would like to add that the critical words in O. 32 r. 13(2) - for the purposes of computation of time - are 'within 14 days from the date of the filing of the application' and in O. 32 r. 13(2)(b) within 14 days from the date of service.
>
> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed.

If Mr Karpal Singh's argument and calculations are correct clearly the defendant had indeed served on the 15th day and was out of time by one day.

In reply Dato' VK Lingam read out para. 4 of encl. 9 which was the affidavit signed by Gobind Singh Deo, counsel for the plaintiff. In the said para. 4 Mr Gobind Singh Deo had clearly referred, not to the late service of the affidavit but he specifically referred to the fact that the summons was served outside the 14 day period. Whilst agreeing with Mr Karpal's submission that O. 32 r. 13(2)(a) refers to the need for an affidavit to be served within the 14 day period, Dato' Lingam pointed out that this was never raised in the affidavit as an issue. Since the objection taken was that the summons was served out of time it was pointed out to me by the defence that pursuant to O. 32 r. 3 of the RHC a summons "must be served on every other party not less than two clear days before the day so specified". Since the date specified in the summons was 6 May 1999 the defendant argued that having served the summons on 21 April 1999 the summons was thus served well within time.

In response, Mr Karpal argued that a summons would include an affidavit which would accompany a summons in any case. Mr Gobind Singh Deo also submitted that the defendant ought to have known that the plaintiff was in fact objecting to the affidavit.

I dismissed the plaintiff's preliminary objection on that very day. In the event of an appeal, I now give my grounds.

The plaintiff must know that if he had specifically pleaded in this affidavit that the summons was served out of time and made no mention of the fact that the affidavit was served one day later, then that is all that the defendant is expected to reply. In fact the defendant very correctly in my view made no reply to Mr Deo's affidavit because the defendant was content to rest its

case on O. 32 r. 3 of the RHC and the fact that the defendant had therefore served the summons well within time. The submission that the defendant ought to know that it was the affidavit the plaintiff was objecting to, is an argument that is a non-sequitur. I must also take into consideration the fact that the said affidavit was indeed sworn by a solicitor and not by his client.

As for the application proper it is my considered judgment that both the solicitors in this case have failed to see the wood for the trees. This is after all only an application for leave for me to consider if the defendant can be allowed to raise these three issues before trial. Let me illustrate. The defendant has submitted fully on the issues of qualified privilege, statutory qualified privilege and qualified privilege as a reply to an attack. If I decide on these issues at this stage based on the submissions of both parties then I am pre-empting the actual application that ought to be made to decide these issues. In the same way the plaintiff has raised the issue of malice and touched on the defendant's allegation of fair comment. Both sides have submitted fully on these respective issues. I have deliberately refused to make a ruling on any of these issues raised by the parties at this stage. Parties must realise that once I make a decision on their present submissions they can be precluded from raising the same issues on the hearing of the application proper. It is purely to be fair to both parties and not to let them tie their hands and feet with these present submissions and then to make a vain attempt at a Houdini's act at the application proper, that I have deferred deciding on the issues raised.

At this stage, all I have to decide is whether the defendant has shown a sufficient case to allow me to give the defendant an opportunity to argue the issues raised by it which it says would put an end to what might be a long and protracted trial. I also will have to give the plaintiff a full opportunity to argue his case of malice and which would then support his case for a full trial.

The research of both counsel shall not go to waste. I shall therefore allow the defendant's application that the issues raised therein be set down and tried as preliminary issues before the trial of other issues raised in this action.